COMMISSIONER OF LAND TITLES, PENANG *a*

v.

LIM THENG HOE

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
HASHIM YEOP SANI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 319 OF 1985]
10 AUGUST 1987 *b*

LAND LAW: *Register of holdings in State of Penang - Correction of erroneous entry in Interim Register - Power of Commissioner - Alteration of endorsement in respect of holding from "Grant (First Grade)" to "Grant" - Registered owner dissatisfied - Appeal to Land Titles Appeal Board - Questions of law referred to High Court by Board for determination - Definition of "Document of Original title" and "Pre-existing" - Old title surrendered for Statutory Land Grant - Whether old title created a pre-existing estate in holding - Question of fee simple.* *c*

The Commissioner of Land Titles, Penang, in exercise of his power under s. 34 of the National Land Code (Penang and Malacca Titles) Act 1963 ("the Act"), on 31 December 1980, made a correction of an entry in the Interim Register maintained under s. 31 of the Act by altering the endorsement in respect of Holding No. 255, South West District, Mukim 4, Penang from "Grant (First Grade)" to "Grant". Being aggrieved by the Commissioner's decision, the respondent who was registered proprietor appealed under s. 15 of the Act to the Land Titles Appeal Board. However, the Board subsequently, pursuant to s. 18 of the Act referred the following questions of law for determination by the High Court, Penang, by way of Case Stated: *d* *e*

(a) Should the Director (i.e. the Commissioner of Land Titles) have applied s. 40 or s. 41 of the Act?

(b) If s. 41 applies is the title to Holding No. 255 held in fee simple or not? *f*

The learned Judge of the High Court, Penang (Edgar Joseph Jr. J) in answer to question (a) held that s. 40 should have been applied and consequently held that question (b) did not arise.

Hence, this appeal by the appellant.

Held: *g*

[1] Since by the deed of 15 October 1953, the owners had conveyed and surrendered to the British Crown the land (Lot No. 240) and had obtained a Statutory Land Grant No. 194, the old titles for the land (Lot 240) ceased to exist as from the time of the surrender. As the old title had ceased to exist since 15 October 1953, nothing can descend from them, and it cannot be said that the Grant (No. 194) descends from the old titles. Therefore, it follows that the old titles did not create a pre-existing estate in the holding (No. 255) as stipulated in s. 40 of the National Land Code (Penang and Malacca Titles) Act 1963 and s. 40 does not apply to the holding (No. 255). *h*

[2] The title for the holding (No. 255) in existence immediately before 1 January 1966 was the Grant (No. 194). This title had been issued under the Crown Lands Ordinance (SS Cap 113) after the subdivision. It descends from no other title except itself. In other words, the document of original title to the holding (No. 255) is a statutory grant issued under the Lands Ordinance (SS Cap 113) and therefore s. 41 applies to the holding (No. 255). *i*

[3] The Statutory Land Grant (No. 194) issued in this case was a Grant substantially in form Schedule A and is a Grant under Part I of the Crown Lands Ordinance (Cap 113), which under s. 5 is subject to the implied covenants stated in that Section and under s. 6 of the Ordinance is subject to the conditions stated in that Section in the absence of an express provision to the contrary. The Grant under Part I is not a grant in fee simple.

[4] Therefore the correct answers to the questions posed should be (a) the Commissioner of Land Titles should have applied s. 41 and (b) the Grant No. 194 for Holding No. 255 did not create an estate in fee simple.

[Appeal allowed with costs]

Legislation referred to:
Crown Lands Ordinance (SS Cap 113), ss. 4, 5, 6, 11(4)
National Land Code (Penang and Malacca Titles) Act 1963, ss. 4(1), 15, 18, 31, 34, 40, 41

For the appellant - Mohd. Shaari bin Yusuff, State Legal Adviser
For the respondent - Lim Kean Chye (Lee Kok Liang with him); M/s. Lee Kok Liang & Co.

JUDGMENT

Wan Hamzah SCJ:

Section 31 of the National Land Code (Penang and Malacca Titles) Act 1963 requires the Commissioner of Land Titles to maintain a register of all holdings in the State of Penang, to be called the Interim Register. Section 34 empowers the Commissioner at any time before the title to a holding has become indefeasible under Part VII of the Act, to correct any erroneous entry in the Interim Register. In exercise of his power under s. 34, on 31 December 1980 the Commissioner by way of making correction of an entry in the Interim Register, altered the endorsement in respect of Holding No. 255, South West District, Mukim 4, Penang, from "Grant (First Grade)" to "Grant". Being aggrieved by the Commissioner's decision to make such alteration, Lim Theng Hoe appealed under s. 15 to the Land Titles Appeal Board. Pursuant to s. 18 the Board referred the following questions of law for determination by the High Court, Penang, by way of Case Stated:

(a) Should the Director (i.e. the Commissioner of Land Titles) have applied s. 40 or s. 41 of the Act?

(b) If s. 41 applies is the title to Holding No. 255 held in fee simple or not?

After hearing submissions made on behalf of Lim Theng Hoe and the Commissioner of Land Titles in the High Court, Edgar Joseph Jr. J gave the following answers:

To question (a): Section 40 should have been applied.

To question (b): In consequence of the answers to question (a), question (b) does not arise.

The Commissioner now appeals to the Supreme Court against the learned Judge's decision.

It is necessary to set out some particulars relating to Holding No. 255. This holding was originally part of Lot No. 240 which was 347a. 2r. Op. in area. The titles for Lot No. 240 were the following:

Grant 2627
Grant 1777
Grant 2609
Grant 1875

Indenture 53
Indenture 60
Indenture 71
Indenture 124
Indenture 140
Indenture 177
Lease 10018
Lease 10044

For the sake of convenience we shall refer to these titles for Lot No. 240 as the old titles. In 1953 Lot No. 240 was subdivided. For the purpose of the subdivision the owners by deed of 15 October 1953 conveyed and surrendered to the British Crown Lot No. 240 under the Crown Lands Ordinance (S.S. Cap. 113). One of the subdivided lots was Holding No. 255, which was 300a. Or. 20p. in area. As a result of the subdivision 19 grants were issued for the subdivided lots. For Holding No. 255 Statutory Land Grant No. 194 was issued.

We now revert to question (a) referred to the Court by the Land Titles Appeal Board, i.e. the question whether the Commissioner of Land Titles should have applied s. 40 or s. 41 of the National Land Code (Penang and Malacca Titles) to Holding No. 255 in the entry in the Interim Register. It is necessary to set out in full the provisions of the two sections:

> 40. Where the document of original title to a holding is a grant, indenture or other form of title made or issued by the Dutch Authorities or by the East India Company or by any Government of the State, and such title created a pre-existing estate in such holding consisting of or in the opinion of the Commissioner equivalent to an estate in fee simple, a grant (first grade) shall be issued in respect of such holding.
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> 41. Where the document of original title to a holding is either a statutory grant issued under the Lands Ordinance or a lease for nine hundred and ninety-nine years a grant shall be issued in respect of such holding.

The words "document of original title" are defined in s. 4(1) to mean the original grant, indenture, lease or other instrument made by the Dutch Authorities, the East India Company, the Crown or the State, as the case may be, from which the pre-existing title to a holding or part of a holding descends or is presumed to descend. The word "pre-existing" is defined in s. 4(1) to mean, generally, in existence immediately before and not having lapsed or expired before the appointed day. Under s. 4(1) the appointed day means the day appointed by the Minister for the coming into force in Penang of the provisions of the Act, which was 1 January 1966. The title to Holding No. 255 in existence immediately before 1 January 1966 was Grant No. 194. The question to be asked is whether Grant No. 194 descends or is presumed to descend from the old titles. Since by the deed of 15 October 1953 the owners surrendered Lot No. 240 to the British Crown, the old titles for Lot No. 240 ceased to exist as from the time of the surrender. Since the old titles had ceased to exist since 15 October 1953, nothing can descend from them, and it cannot be said that Grant No. 194 (which was in existence immediately before 1 January 1966 for Holding No. 255) descends from the old titles. Therefore it follows that the old titles did not create a pre-existing estate in Holding No. 255 as stipulated in s. 40; and s. 40 does not apply to Holding No. 255.

As already stated, the title for Holding No. 255 in existence immediately before 1 January 1966 was Grant No. 194. This title had been issued under the Lands Ordinance (S.S. Cap. 113) after the subdivision. It descends from no other title except itself. In other words the document or original title to Holding No. 255 is a statutory grant issued under the Lands Ordinance (S.S. Cap. 113), and therefore s. 41 applies to Holding No. 255.

As regards question (b) we understand the question to be whether the estate in the Holding No. 255 created by Grant No. 194 consists of a fee simple or not. Section 11(4) in Part I of the Crown Lands Ordinance (Cap. 113) provides as follows:

> In the case of grants issued under this section not being issued in exchange for a grant issued under this Part such modification may be made in the form of grant prescribed as are necessary in order to make the new tenure not less beneficial than the original one.

Except in a case falling under s. 11(4), all grants issued under s. 11 must be in the form of Schedule A to the Ordinance. This is so because s. 4 provides that every grant of land issued under Part I shall be in the form or to the effect of Schedule A. Grant No. 194 for Holding No. 255 is substantially in the form of Schedule A except for the reference therein to the subdivision. The question is whether Grant No. 194 has on the face of it any modification which shows that it was issued under s. 11(4) to make the new tenure not less beneficial than the original one under the old titles. We find that there is no such modification on the face of Grant No. 194. So Grant No. 194 is a grant under Part I, which under s. 5 is subject to the implied covenants stated in that section and under s. 6 is subject to the conditions stated in that section, in the absence of an express provision to the contrary. It is common ground that grants under Part I are not in fee simple, and grants under Part II are in fee simple.

Despite the words "modification may be made" appearing in s. 11(4) it was submitted on behalf of the respondent that Grant No. 194 is a grant issued pursuant to s. 11(4) in which the tenure should be not less beneficial than the original one under the old titles and since it was issued pursuant to s. 11(4) it is a grant under Part II. The submission implies an argument either that the words meant that the modification must be made or that the Commissioner was wrong in not exercising his discretion to make the modification. In our judgment the words give discretion to make the modification. As to whether the Commissioner was wrong in the exercise of his discretion, that is not the question which the Board has asked the Court to answer. There is no evidence that Ban Hin Company Limited raised objection or protest at the time when the grant was issued to it. Besides, we do not see how the respondent can raise the objection now since he accepted the conveyance of Grant No. 194 in its present form from Ban Hin Company Limited.

Therefore in our judgment the correct answers should be as follows:

To question (a): The Commissioner of Land Titles should have applied s. 41.

To question (b): Grant No. 194 for Holding No. 255 did not create an estate in fee simple.

The appeal is allowed with costs here and in the Court below. The deposit should be refunded to the appellant.

Also found at [1988] 1 CLJ 115